Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 79-1487

SHANNON T. ASHWORTH,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals has not been reported.

JURISDICTION

Although Petitioner asserts that this Court has jurisdiction under 28 U.S.C. §1257(3), it is Respondent's position that this Court is without jurisdiction to consider the petition in that the issue raised was never properly presented to the highest court of the State of Alabama, and hence, the requisite "final judgment or decree" rendered by the Supreme Court of Alabama is not present.

QUESTIONS PRESENTED

I.

WHETHER THIS COURT HAS JURISDICTION TO REVIEW AN ISSUE WHICH WAS NOT PROPERLY PRESENTED IN THE ALABAMA STATE COURTS.

II.

WHETHER THE TRIAL COURT PROPERLY CHARGED THE JURY ON MALICE.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1257(3)

Alabama Rules of Appellate Procedure, Rule 39(a)

Alabama Rules of Appellate Procedure, Rule 40

STATEMENT OF THE CASE

Petitioner was convicted of second degree murder in the Circuit Court of Jefferson County, Alabama, and punishment was fixed at twenty years.

As no brief was filed on behalf of Petitioner's appeal, the State of Alabama submitted a brief showing that the prosecution had proved a prima facie case of second degree murder.

Petitioner's conviction was subsequently affirmed without opinion by the Alabama Court of Criminal Appeals on September 4, 1979.

Thereafter on September 18, 1979, Petitioner filed an application for rehearing in which the only issue raised concerned an alleged comment by the district attorney on the failure of defense counsel to call witnesses available to him. Said rehearing application was overruled on October 10, 1979.

Petitioner subsequently filed a petition for writ of certiorari and brief to the Alabama Supreme Court on October 25, 1979. It was at this time that the state courts of Alabama were first presented with the issue concerning the jury charge on malice. The petition for writ of certiorari was summarily denied without opinion on December 21, 1979.

ARGUMENT

I.

THE SUPREME COURT HAS NO JURISDICTION TO REVIEW AN ISSUE WHICH WAS NOT PROPERLY PRESENTED IN THE STATE COURTS.

The State of Alabama strongly urges that this Court is utterly without jurisdiction to review the issue raised by Petitioner due to his failure to first properly present the question to the Supreme Court of Alabama and obtain a "final judgment or decree" on the question as required under 28 U.S.C. §1257(3).

Under Alabama law it is clear that the Alabama Supreme Court did not consider the jury charge on malice in its summary denial of a petition for writ of certiorari. First, the Supreme Court of Alabama was bound to deny the petition under Rule 40, Alabama

Rules of Appellate Procedure, which bars a party from applying for a rehearing and, subsequently a petition for writ of certiorari, where there was no original brief on the merits, as was the situation in the case at bar.

Moreover, Rule 39(a), Alabama Rules of Appellate Procedure, dictates:

> Method. Decisions of the courts of appeals may be reviewed by the supreme court upon petition for writ of certiorari only after the court of appeals has overruled an application for rehearing on the point, issue or decision complained of.

Hence, it is abundantly clear that the Supreme Court of Alabama could not consider a point or issue which had not first been presented to the Alabama Court of Criminal Appeals.

The absence of jurisdiction has been noted and discussed in many opinions of the

Court. In Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642, note 9, the Court noted that an issue not raised in the state courts was not properly before the Supreme Court. Note 11 further reiterated that when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary. At no point in his brief does Petitioner assert that the issue on malice was properly presented in the state courts, nor could such an assertion be shown.

A similar jurisdictional question was raised in Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572, where it was held that if the question was not presented to the state courts in such a manner that it was necessarily decided by the highest court of the state when it affirmed the conviction,

then the Supreme Court had no power to consider the matter.

Finally, Bailey v. Anderson, 326 U.S. 203, held that unless the record affirmatively shows that the highest state court passed upon a constitutional question in denying a writ of error, then jurisdiction does not lie in the Court.

Based upon the foregoing cases, the Respondent submits that the issue raised by Petitioner cannot be considered by the Court.

II.

THE TRIAL COURT PROPERLY CHARGED THE JURY ON MALICE.

Petitioner argues that the trial court failed to charge the jury that malice can be presumed from the doing of an unlawful act wilfully "if and only if there is an absence of any legal justification, excuse or extenuation."

However, Respondent submits that this contention is totally without merit.

At the close of the court's oral charge the following transpired:

> THE COURT: Are there any exceptions to my charge?
>
> MR. WILKINSON: Just one, your Honor. (Taken out of the presence of the jury:) I except to the Court's definition of malice as being any act unlawfully done. That is the exception.
>
> THE COURT: Ladies and

> gentlemen, it has been pointed out to me that I may not have described something to you. I am going to tell you again. Malice in law does not necessarily mean hate or ill-will, but is defined as any unlawful act willfully done without legal excuse or justification. (R. 276)

Hence, from the foregoing portion of the transcript, it cannot be disputed that the jury was instructed that in order for malice to be presumed from the doing of an unlawful act, there must be an absence of any legal justification, excuse or extenuation.

Therefore, Petitioner has utterly failed to show any constitutional deprivation.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

/s/_____
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/s/_____
MARY JANE LECROY
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

/s/_____
JEAN WILLIAMS BROWN
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of May, 1980, I did serve a copy of the foregoing Brief and Argument in Opposition to Petition for Writ of Certiorari to the Court of Criminal Appeals of Alabama on attorneys for Petitioner by placing same in the U.S. Mail, postage prepaid and properly addressed to the following:

Arthur J. Hanes
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/s/
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